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No. 97-66

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MAURICE RIVERS AND ROBERT C. DAVISON,

Petitioners

v.

ROADWAY EXPRESS, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONERS' REPLY TO BRIEF OF RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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Petitioners wish to respond briefly to a number of points made by the respondent in its brief in opposition to the petition for a writ of certiorari.

1. Respondent makes factual assertions that are based on the district court's findings of fact at the bench trial on petitioners' Title VII claims. This reliance is misplaced, since the issue here is whether the courts below were correct in granting summary judgment on petitioners' claims under 42 U.S.C. § 1981, thereby depriving petitioners of a jury trial to which they were entitled under *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990). Thus, for example, at pages 5-6 of the Brief in Opposition, respondent asserts that petitioners were ordered to attend the hearings on September 26. However, petitioners disputed this, and the district court erred in resolving this factual dispute in

respondent's favor on summary judgment. *See*, the Petition for a Writ of Certiorari, p. 13.

2. At page 19 of the Brief in Opposition, respondent asserts that the petitioners have misrepresented the facts when they state that it is "undisputed that one of the grounds for the successful grievance was that discipline was being carried out in a racially discriminatory fashion." Petition for a Writ of Certiorari, page 29. This statement by petitioners is accurate, however: it is fact that one of the grounds that petitioners asserted during their first, successful grievance, was that discipline was being carried out in a racially discriminatory manner. The grievance committee upheld the grievance (without specifying the particular ground or grounds for its decision). Respondent refers, in footnote 3 on page 19 of the Brief in Opposition, to the bench trial on the Title VII claims. For the reasons stated in paragraph 1. above, this reference is unavailing. At the jury trial on their 1981 claims to which petitioners are entitled, the question of the admissibility of an arbitrator's spontaneous volunteering of the racial reasoning behind the grievance panel's favorable decision will be raised.

3. In footnote 2, page 11, of the Brief in Opposition, the respondent cites four recent decisions of the Sixth Circuit which it claims shows that there is no conflict with other circuits. However, if anything, the cases cited support the need for a grant of certiorari to resolve the question of the appropriate standards for deciding a case of retaliatory discharge:

a. Crabbs v. Copperweld Tubing Products Co., 114 F.3d 85 (6th Cir. 1997) and *Woythal v. Tex-Tenn Corp.*, 112 F.3d 243 (6th Cir. 1997) are two more examples of affirmances by the Sixth Circuit of grants of summary judgment in EEO cases. Thus, they support petitioners' argument, made at pages 24-25 and notes 47 and 48 of the Petition for a Writ of Certiorari, as to why certiorari should be granted. Moreover, neither of the decisions constitutes a holding concerning the issue of comparator evidence, since in neither case, according to the court of appeals, was there *any* evidence in the record of discrimination based on age.

b. EEOC v. Avery Dennison Corp., 104 F.3d 858 (7th Cir. 1997) did not raise the issue of comparators at all, since the issue presented was purely one of retaliation for filing a charge with the Equal Employment Opportunity Commission. Thus, unlike the present case, the issue of race and comparisons with similarly situated white employees was not present.

c. Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996) is also inapposite, since the claim was discrimination under the Pregnancy Discrimination Act (PDA). The holding of the Sixth Circuit was that the standard for comparisons under the PDA was different from that for race claims under Title VII. In race cases the standard was, as discussed in the Petition for a Writ of Certiorari, that white comparators must be "similarly situated 'in all respects.'" Because of the specific language of the PDA, the comparator need only be "similar in his or her 'ability or inability to work'" as the plaintiff. 100 F.3d at 1226. Thus, once again, this decision supports the arguments made in the Petition for a Writ of Certiorari as to why certiorari should be granted.

4. With regard to the question of what contractual right was sought to be enforced by petitioners and gave rise to their claim under section 1981, it is clear that petitioners were seeking to enforce their right to file a grievance over discipline, including specifically to grieve on the basis that discipline was administered in a racially discriminatory manner. Petitioners won that grievance and were, it is alleged, retaliated against for being successful.

It is also clear that this contractual claim was not identified for the first time in response to the respondent's motion for summary judgment in 1995, but was raised at least as early as the first appeal to the Sixth Circuit in 1992. As the dissent below noted (Appendix to the Petition at p. 8a), the first decision of the court of appeals stated that "Rivers and Davison were punished, they contend, for trying to utilize the established legal process for their grievances." Appendix to the Petition at page 62a; *Harvis v. Roadway Express*, 973 F.2d 490, 494 (6th Cir. 1992).

In addition, it is clear that petitioners sought to enforce contractual rights to be free of racial discrimination, to have proper notice of disciplinary hearings, and to have discipline based only on "just cause." The fact that these rights were not specifically spelled out in black letters in the collective bargaining agreement did not mean that those rights did not exist. Petitioners' claim is that they were established by custom and past practice, and, therefore, were enforceable. *See, e.g.*, ELKOURI AND ELKOURI, *How Arbitration Works*, Chapter 12, "Custom and Past Practice," pp. 437-56 (4th ed., BNA 1985)(discussing past practice); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 579 (1960)(specific words of contract not dispositive); *Ethyl Corp. v. Steelworkers*, 768 F.2dd 180, 185-86 (7th Cir. 1985)(implied terms in a contract). The meaning of the contract and whether there was a past practice that supported the claim of implied rights would have been for the jury in the section 1981 trial to decide. *Scott v. Anchor Motor Freight*, 496 F.2d 276 (6th Cir. 1974).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the decision of the court below reversed.

Respectfully submitted,

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